

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 99-F-09

Date issued: June 29, 1999

Requested by: Representative Gerald O. Sveen

- QUESTION PRESENTED -

Whether N.D.C.C. chapters 43-20 and 43-28 allow the State Board of Dental Examiners to adopt rules authorizing dental hygienists to administer local anesthetics by injection.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that state law does not allow the State Board of Dental Examiners to adopt rules authorizing dental hygienists to administer local anesthetics by injection.

- ANALYSIS -

The State Board of Dental Examiners (Board) licenses and regulates dentists and dental hygienists. N.D.C.C. § 43-28-06. See generally N.D.C.C. chs. 43-20 (Dental Hygienists) and 43-28 (Dentists). The Board is a state agency. N.D.C.C. § 28-32-01. See also Sletten v. Briggs, 448 N.W.2d 607 (N.D. 1989), cert. denied 493 U.S. 1080 (1990) (holding the State Board of Medical Examiners is an administrative agency). The Board is authorized to adopt reasonable rules in carrying out its licensing function. N.D.C.C. §§ 43-20-10 (Dental Hygienists) and 43-28-06(1) (Dentists). "However, an agency may not promulgate a rule or regulation which exceeds its statutory authority." Hecker v. Stark County Social Service Board, 527 N.W.2d 226, 232 (N.D.1994). Such a rule is void and without force. Id.

The practice of dental hygiene is defined as "the removal of accumulated matter from the natural and restored surfaces of teeth and from restorations in the human mouth, the polishing of such surfaces, and the topical application of drugs¹ to the surface

¹ It is assumed for purposes of this opinion that anesthetics are drugs. See Stanley F. Malamed, D.D.S., Handbook of Local Anesthesia (2d ed. 1986) (referring to "all local anesthetic drugs"); Kathryn B.

tissues of the mouth and to the surface of teeth if such acts are performed under the direct, modified general, or general supervision of a licensed dentist." N.D.C.C. § 43-20-03. Dental hygienists may apply anesthetic drugs to "the surface tissues of the mouth," which implies that they may not inject anesthetic drugs below the surface tissues. The importance of this distinction is evidenced by the fact that dentists are permitted to administer local or general anesthetics without being limited to surface application. N.D.C.C. § 43-28-01(6). See In re Township 143 North, Range 55 West, Cass County, 183 N.W.2d 520, 529 (N.D. 1971) ("It is a general principle of statutory interpretation that mention of one thing implies exclusion of another.")

N.D.C.C. § 43-20-03 also provides that "[a]dditional tasks permitted to be performed by licensed dental hygienists may be outlined by the board of dental examiners by appropriate rules." It may be argued that this provision supports the adoption of rules to allow dental hygienists to inject local anesthetics. A corollary question is whether N.D.C.C. § 43-20-12 allows a licensed dentist to delegate injection of anesthetics to a dental hygienist or dental assistant. That section allows delegation to a dental hygienist or dental assistant of "procedures over which the dentist exercises full responsibility not requiring professional judgment and skill." N.D.C.C. § 43-20-12(1). Moreover, N.D.C.C. § 43-20-12(2) provides that "[a] dental assistant may perform such delegated procedures over which a dentist exercises direct supervision as are established by rules adopted by the state board of dental examiners."

Statutory limitations on the practice of dental hygienists prevent them from practicing dentistry. The practice of dentistry includes the administration of anesthetics and prescribing "for any disease or condition of the human oral cavity, teeth, gingivae and soft tissues." N.D.C.C. § 43-28-01(6). The Legislature has authorized a dental hygienist to apply anesthetics to surface tissues of the mouth. N.D.C.C. § 43-20-03. It has not authorized a dental hygienist or assistant to inject anesthetics. Injection of anesthetics by dental hygienists or assistants is beyond the scope of statutory authorization in chapter 43-20, and is instead a part of the practice of dentistry in chapter 43-28. A rule permitting dental hygienists or dental assistants to inject a local anesthetic would be beyond the scope of statutory authority relating to the practice of

Graham, R.D.H., M.S., Local Anesthesia and Pain Control - a modular approach ¶ III (same). See also N.D.C.C. §§ 19-03.1-01(13), 43-15-01(9) (defining drugs as substances or articles recognized as drugs in certain official publications and used to treat disease).

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dental hygiene. Little v. Tracy, 497 N.W.2d 700, 704 (N.D. 1993) (An administrative regulation may not exceed statutory authority nor supersede a statute). See also Medical Properties Inc. v. N.D. Bd. of Pharmacy, 80 N.W.2d 87, 89 (N.D. 1956) (holding the pharmacy board has power to make rules only for the administration of duties assigned by statute; and has no right to make a rule including any substantive matter not included in the statute under which it is acting); Hecker 527 N.W.2d at 234 ("administrative agencies do not initiate policy but follow the policy created by the law which guides the agency," citing Moore v. N.D. Workmen's Comp. Bureau, 374 N.W.2d 71 (N.D. 1985)).

Further, general statutory authority for the Board to adopt rules permitting dental hygienists to perform additional tasks and permitting dentists to delegate procedures to dental hygienists or dental assistants must be construed in a manner consistent with the more specific statutory limitation which does not permit dental hygienists or assistants to inject drugs. See N.D.C.C. §§ 43-20-03, 43-20-12. When several sections or subsections of law relate to the same subject, they must each be given meaningful effect without making one or the other useless. State v. One 1990 Chevrolet Pickup, 523 N.W.2d 389, 393 (N.D. 1994). "Statutes must be read to give effect to all provisions so that no part of a statute is inoperative or superfluous." Matter of Estate of Opatz, 554 N.W.2d 813, 816 (N.D. 1996). If general authority granted to the Board permitting "additional tasks" to be approved is interpreted to allow the Board to authorize by rule performance of tasks contrary to a statutory prohibition, then the statutory prohibition is rendered meaningless. Similarly, to construe a general authority to delegate tasks to permit dental hygienists or assistants to perform a task forbidden by statute would likewise make the prohibition meaningless.

This office has consistently found that the prescription and administration of medication is so inimically connected to the health of the public that it is for the Legislature to determine which persons are authorized to prescribe or administer medication. See letter from Attorney General Nicholas J. Spaeth to Calvin N. Rolfson (Nov. 16, 1990) (requiring the Board of Nursing to seek specific legislative authority to authorize nurses with advanced training to prescribe medication); Letter from Attorney General Nicholas J. Spaeth to R.W. Wheeler (Feb. 5, 1991) (disapproving a rule of the State Board of Medical Examiners authorizing a physician assistant to prescribe medication as an agent of a physician because there was no specific legislative authority).

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Therefore, it is my opinion that the State Board of Dental Examiners may not adopt rules authorizing dental hygienists to administer local anesthetics by injection. Any tasks which the Board may wish to consider as "additional tasks" under N.D.C.C. § 43-20-03 or delegable procedures under N.D.C.C. § 43-20-12 should be consistent with statutory authorization and statutory prohibitions on the scope of practice for dental hygienists. If the Board believes that a dental hygienist should be able to inject a local anesthetic, it is my recommendation that the Board seek specific legislative authority to allow a dental hygienist to inject a local anesthetic or for a dentist to delegate that task to dental hygienists or dental assistants.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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